IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.467 OF 2007
IN
SUIT NO.3537 OF 2004

Quadricon Pvt.Ltd. ....Plaintiff

Versus

Shri Bajrang Alloys Ltd. ....Defendant

Mr.Zal T. Andhyarujina with Mr.H. S. Jain i/b Thakoredas & Madgavkar for the Plaintiff.

Mr.M. S. Doctor with Mr.Darshan Mehta i/b M/s.Dhrue Liladhar & Co. for the Defendant.

CORAM : S.J. VAZIFDAR, J.
DATE : 12TH DECEMBER, 2007.

ORAL JUDGMENT :

1. This is the Plaintiff's application for leave under clause 12 of the Letters Patent.

2. The questions that arise in this case fall into two categories. The first is whether leave under clause 12 of the Letters Patent can be granted after the plaint is not only presented under rule 1 of Order IV but is also admitted and entered in the register under rule 2 of that

Order of the Code of Civil Procedure, 1908. The second is whether the Plaintiff is entitled to leave under clause 12 even assuming the first question is answered in the affirmative. I have answered the first question in the negative and the second in the affirmative.

FACTS

3(A). It is admitted that the plaint was presented on 29.9.2004 that it was admitted on 10.12.2004 without leave having been sought or obtained.

(B)(i). The Defendant took out Notice of Motion No.745 of 2005 raising a preliminary issue of jurisdiction under Section 9(A) of the Code of Civil Procedure, 1908 and for a declaration that this Court does not have jurisdiction to try the present suit and consequently for an order that the plaint be returned under order VII Rule 10 of the CPC.

(ii). The Plaintiff filed an affidavit in reply dated 27.3.2006. In paragraph 15, the Plaintiff stated that it intended applying for leave under clause 12 of the Letters Patent which it did on 27.3.2006.

(iii). By an order dated 26.4.2006 in Notice of Motion No.745 of 2005, D.K. Deshmukh, J. recorded that the Defendant did not press

prayer clause (a) of Notice of Motion wherein the Plaintiff sought the decision of this Court under Section 9(A) of the CPC on the preliminary issue as to jurisdiction. The learned Judge held that there was no power to grant an interim decree of declaration and that therefore there was no question of granting the other prayer for the return of the plaint. The learned Judge held that the plaint could be returned only on the application of the Plaintiff and not on the application of the Defendant. The learned Judge therefore dismissed the Notice of Motion.

(C). The Defendant filed Appeal No.896 of 2006 against the said order dated 26.4.2004. The Appeal was disposed of by an order dated 13.12.2006. The Division Bench while dismissing the Appeal held that it was open to the Defendant to make an application for rejection of the plaint under Order VII Rule 11 of CPC and that if such an application is made, it would be considered uninfluenced by the order dated 26.4.2004.

(D). In the circumstances, the Defendant took out Notice of Motion No.467 of 2007 for an order rejecting the plaint under Order VII Rule 11 of the CPC.

4. This order is restricted to the Plaintiff's application for leave under clause 12 of the Letters Patent.

5. Mr.Doctor submitted that leave cannot be granted under clause 12 of the Letters Patent at this stage. He further submitted that leave under clause 12 in any event ought not to be granted as no part of the cause of action had arisen within the jurisdiction of this Court.

6. Admittedly, the suit was presented/lodged on 29.9.2004 and the plaint was admitted on 10.12.2004. The leave under clause 12 of the Letters Patent was not sought either before the plaint was presented or before it was admitted.

WHETHER LEAVE UNDER CLAUSE 12 OF THE LETTERS PATENT CAN BE GRANTED AFTER A PLAINT IS ADMITTED AND ENTERED IN THE REGISTER OF CIVIL SUITS

7. I must express my appreciation for the thorough research and well presented submissions by both Mr.Andhyarujina and Mr.Doctor. I did at one stage during the arguments think that it was open to me to answer the first question on principle on a line of reasoning I will refer to later. However, having considered again all

the authorities upon reserving the judgment, I find that it is not open to me to decide the matter on principle. I find myself bound by the judgments of this Court and it is on this basis that I must answer the question.

8. The judgment in *Bai Amrit, ILR (1884) 8, Bom.380,* is not of any assistance while deciding the question before me. The question was neither raised nor decided in the judgment.

9. In *Rampurtab Samruthroy v. Premsukh Chandamal, ILR, (1890) 15, Bom.93,* the Plaintiff who had earlier obtained the leave under clause 12 of the Letters Patent applied for an amendment. Telang, J. held that granting the amendment would be permitting the Plaintiff to obtain an adjudication upon a cause of action different from that for which leave of the Court had been obtained and one which must be substantiated by very different evidence, and which must involve an investigation of an entirely different character. The learned Judge further held :-

> "I consider that such a proceeding is not sanctioned by law. In Shaikh 1 Ind.Jur. (N.S.), 218.) Abdool Hamed v. Promothonath Bose, Phear, J., decided in Calcutta that the leave required by clause XII of the Letters Patent must be granted, if at all, at the time of the acceptance

> of the plaint, and cannot be granted afterwards. And this view, which is entirely in consonance with the express words of clause XII, has, I believe, been always accepted in this Court." (emphasis supplied.)

It is clearly held therefore that leave under clause XII cannot be granted after the plaint is accepted.

10. A Division Bench of this Court in *Devidatt v. Shriram, 30(4) BLR, 236* affirmed the judgment in *Rampurtab's* case and held as follows :-

> "Clause 12 of the Letters Patent defines the limits of the original jurisdiction of this Court and reading the clause, apart from authority,it seems to me clear that in a case in which the cause of action has arisen in part only within the local limits of the original jurisdiction, it is a condition precedent to the maintenance of the suit that the leave of the Court should have been first obtained. The condition of obtaining leave is an essential qualification of the suit. This, I think,has been the general view of High Courts in India, see e.g., the judgments of Sir Richard Couch in Hadjee Ismail Hadee Hubbeed v. Hadjee Mahomed Hadjee Joosub, of Sir Basil Scott in Abdul Kadir v. Doolanbibi, of Mr.Justice Telang in Rampurtab Samruthroy v. Premsukh Chandamal and of a special bench of the Calcutta High court in Laliteshwar Singh v. Rameshwar Singh.
>
> .....
>
> In my judgment the words of cl. 12 of the letters

> Patent are quite clear and make the obtaining of leave a condition precedent to the entertainment by this Court of a suit in which the cause of action arises in part outside the jurisdiction, and the condition is not one which it is competent for a Court to ignore or for the parties to `waive'.
>
> The question then is whether the granting of leave under cl. 12 is a condition precedent going to the root of the jurisdiction of the Court or a mere matter of procedure capable of being waived by conduct or agreement of the parties.
>
> Clause 12 of the Letters Patent provides that the High Court of judicature at Bombay in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description, if in the case of suits for land (omitting unnecessary words) the land is situate, or in all other cases, if the cause of action shall have arisen either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original civil jurisdiction of the High Court. The rest of the clause is not material. The words “empowered to receive” seem to me to be important and the meaning is that the Court on the ordinary original civil jurisdiction has no jurisdiction even to receive a plaint where a part of the cause of action only shall have arisen within the local limits of its jurisdiction unless leave of the Court shall have been first obtained.”

11(A). In *Ramgopal Chunilal v. Ramsarup Baldevdas, 36, BLR, page 84, th*e Division Bench distinguished between the two stages contemplated under rules 1 and 2 of Order IV of the CPC while

considering when a suit is deemed to be instituted within the meaning of Section 3 of the Indian Limitation Act. It was contended on behalf of the Appellants that a plaint cannot be presented except to a Judge who is the only person who can give leave to sue under clause 12 of the Letters Patent and that the presentation of the plaint to proper officer in the Prothonotary's office does not institute a suit where leave to sue is required under clause 12 of the Letters Patent. The Division Bench held that the arguments involved a confusion between “presentation of the plaint” and “admission or receipt of the suit”. The Division Bench held at page 87 as under :-

> “It is quite clear under our Rules and practice that the proper officer to receive the plaint is the Prothonotary, or somebody in his office to whom the duty is delegated by him. The only question is whether that rule can apply to a case to which cl.12 of the Letters Patent is applicable. It is settled law that giving of leave under cl.12 is a judicial act which cannot be delegated by the Court to the Prothonotary or any other officer, and the clause provides in effect that until leave is granted the Court shall not receive, try or determine the suit. But, I think, that the argument of the appellant really involves a confusion between “presentation of the plaint” and “admission or receipt of the suit”. To my mind, the plaint,even where leave is required,is presented when it is handed over by the plaintiff or his agent to the proper officer in the Prothonotary's office. If leave is required, the plaint

> must be submitted to the Chamber Judge and leave obtained from him under cl.12 of the Letters Patent. When that leave is obtained the officer in the Prothonotary's office must see that the plaint is in order and admit it under Order IV, rule 2, and he cannot admit the plaint until the leave of the Judge has been obtained. But, to my mind, the obtaining of the leave of the Judge and the admission of the plaint does not affect in any way the presentation of the plaint for the purposes of the Indian Limitation Act. That being so, I think that the decision of the learned Judge is right and this suit was instituted within the period of limitation, viz., on May 25, 1932, and the plaintiffs are entitled to judgment in their favour."

(B). It is important to note that the question whether the leave ought to be applied for at the stage before presentation of the plaint under Order IV rule 1 of the CPC or at the stage before the admission thereof and its being entered in the register of civil suits did not arise in this case. The Division Bench did not deal with the question which falls for my consideration where admittedly leave was not even sought at either stage.

12. In an unreported judgment dated 8.12.1976 in Suit No.130 of 1977 in the case of – *M/s.Shiv Silk Mills and other v. M/s.B. M. Khanna & Sons and others,* Mridul, J. held that the expression "in case the leave of the Court shall have been first obtained" postulates that

but for such leave which was to be obtained before-hand, the suit would be unauthorized and incompetent. It was further held that the leave under clause 12 of the Letters Patent is a condition precedent for maintainability of the suit and in the absence of such leave the suit is rendered incompetent and the proceedings in respect thereof are a nullity. The learned Judge further held “it is well settled practice of this Court that a suit in respect of which leave is not obtained has to be dismissed”. The learned Judge held that there was an established practice of this Court not to return the plaint in such a case but to dismiss the suit. As far as this aspect is concerned, the learned Judge also noted the insertion of rule 269-A in Original Side Rules.

13. I must clarify that I do not find it necessary while considering the present application for leave under clause 12 of the Letters Patent to consider the consequence of leave not having been obtained though required. If and when an application is made by the Plaintiff or by either party based on this judgment, the point would be considered.

14. Before dealing with the judgments relied upon by Mr.Andhyarujina, it is necessary to refer to one other judgment. In

Rhoda J. Mehta & Ors. v. Homi F. Mehta & Ors., 1989 Mh.L.J. 124. The Plaintiff had filed the suit without obtaining the leave under clause 12 of the Letters Patent prior to the lodging of the plaint and sought an order for return of the plaint for presentation in the proper Court. It was contended on behalf of the Defendant that the suit ought to be dismissed. The learned Judge permitted the return of the plaint having held that the Court was not empowered to receive the plaint at the time when it was presented to this Court. The learned Judge differed with the judgment of Mridul, J. on the question whether the suit ought to be dismissed or whether the plaint ought to be returned. The learned Judge also differed with the judgment of another learned single Judge of this Court in *Union Bank of India v. Sunpac Corporation and Ors., 1986 Mh.L. J. 237* which I shall refer to shortly. The learned Judge held that if the Court is not permitted to receive the plaint, before or after admission of a suit, it should not make any difference as the Court cannot deal with such a suit at all. The learned Judge held as follows :-

> "8. As rightly pointed out by Mr.Justice Rangnekar in the case of Devidatt Ramniranjandas vs. Shriram Narayandas (supra), the most important words in Clause XII of the Letters Patent

> are “empowered to receive”. If I am not empowered to receive a plaint,it must necessarily mean that I ought not to have really admitted the plaint. If I have admitted the plaint, that is per se without jurisdiction and, if that is so, I must necessarily return the plaint to the person who has lodged the same.”

Whether the plaint ought to be returned or whether the suit ought to be dismissed is again a question which need not detain me while considering the present application for leave under clause 12 of the Letters Patent. Suffice it to state that the effect of the judgment is that the leave ought to have been taken prior to lodging the plaint and not merely prior to admitting the suit. This view has been held to be per incuriam as I shall shortly demonstrate but that is of no relevance to the question before me as here the leave was not sought even before the next stage viz. the admission of the plaint and its entry in the register.

15. Jhunjhunwala, J. followed this judgment in *Noorjahan v. Sadrunnisa, 1993 Mh.L. J. 208*. Paragraph 4 of the judgment reads thus :-

> “4. Clause XII of the Letters Patent as applicable to this Court provides that this Court in exercise of its Ordinary Original Civil Jurisdiction shall be empowered to receive, try and determine

> suits of every description if in the case of suits for land (omitting unnecessary words) the land is situate, or in all other cases, if the cause of action shall have arisen either wholly or in the case of the leave of the court shall have been first obtained, in part, within the local limits of the Ordinary Original Civil Jurisdiction of this Court (emphasis supplied). The words "empowered to receive" mean that the Court on the Ordinary Original Civil Jurisdiction has no jurisdiction even to receive a plaint where a part of the cause of action only shall have arisen within the local limits of its jurisdiction unless leave of the Court shall have been first obtained. The leave under clause XII of the Letters Patent is a condition precedent to jurisdiction, so that unless the condition is fulfilled by obtaining the necessary leave to sue, the Court will have no jurisdiction to entertain the suit. Such leave affords the very foundation of the jurisdiction and hence, it must be obtained before the institution of the suit. <u>It cannot be granted after the suit has been instituted.</u> (emphasis supplied.)

In addition therefore to holding that the Court has no jurisdiction even to receive a plaint where leave under clause 12 of the Letters Patent though required is not taken, the learned Judge also held that such leave cannot be granted after the suit has been instituted. This latter finding is relevant for the purpose of the present case.

16. From the above judgments, one thing is clear. As held in *Rampurtab's* case, the leave must be granted at the time of

acceptance of the plaint and cannot be granted afterwards. This judgment was affirmed by the Division Bench in *Devidatt's* case holding that the leave under clause 12 of the Letters Patent is a condition precedent to the maintenance and entertainment of the suit and that the leave of the Court should be first obtained i.e. obtained before the institution of the suit. The judgment in *Noorjahan's* case also inter-alia held that the leave cannot be granted after the suit has been instituted.

17. Admittedly in the present case, the plaint has not only been presented but has also been admitted. In view of the above judgment, leave cannot be granted now at this stage.

18. Mr.Andhyarujina's reliance upon four judgments of this Court in support of his submission that leave can be granted even at this stage is not well founded.

19(A). In *Union Bank of India v. Sunpac Corporation, 1986, Mh.L. J. 237*, Sawant J. following the judgment in *Ramgopal's* case drew a distinction between “presentation” and “admission” of a plaint. The learned Judge held that so long as the plaint is not admitted and entered in the register of suits all defects including that of the absence

of leave under clause 12 of the Letters Patent can be removed without returning the plaint considering that there is no question of returning the plaint which is not admitted and that it simply remains under objection till it is admitted. In other words according to the learned Judge, it is necessary for a party to obtain the leave not at the stage of presentation of the plaint to the proper officer but prior to its admission and entry in the register of suits.

(B). I do not see how this judgment is of any assistance to the Plaintiff. In the present case, admittedly the plaint has been admitted and entered in the register of suits. The question whether leave can be granted after the suit has been admitted and entered in the register did not arise before the learned Judge and there is nothing in the judgment which deals with the issue.

20. R.J. Kochar, J. in an unreported judgment dated 11.3.1999 in S.S. (Ldg.) No.213 of 1999, *Nat Steel Equipment Pvt. Ltd. v. Bangalore Heart Hospital and Research Centre and Frank C. Spenccer Centre & anr.* followed the judgment in *Sunpac Corporation.* For the above reasons this judgment too is of no assistance for deciding the question before me.

21. Mr.Andhyarujina relied upon a judgment of a learned single Judge, Khanwilkar, J. in *Air India Ltd. v. Caribjet Inc., 2004(4) Bom. C.R., 53* and the judgment of the Division Bench (to which I was a party) in *Caribjet Inc. v. Air India Ltd., 2005 (3), B.C. R., 1994*, upholding the judgment.

In that case the Plaintiff presented the plaint before the authorized officer of this Court on 20.7.2001. Leave under clause XII of the Letters Patent was granted by an order of this Court dated 8.9.2001. Thereafter the suit came to be numbered on 13.9.2001. It was contended that the Plaintiff had lodged the suit on 20.7.2001 without obtaining prior leave under clause 12 of the Letters Patent which was impermissible. The learned Judge following the judgment in *Union of India v. Sunpac Corporation* and the judgment in *Nat Steel Equipment Pvt. Ltd.* held that the plaint having been lodged prior to obtaining leave under clause 12 of the Letters Patent would make no difference and that it is only upon numbering of the suit that the suit can be said to have been received by this Court. The learned Judge therefore rejected the contention on behalf of the Defendant that the plaint be returned to the Plaintiff.

It must be noticed that in this case leave was obtained prior to the suit being admitted and numbered whereas in the case before me the plaint has been admitted and entered in the register and numbered without leave having even been sought.

It is however, important to note that in paragraph 14 of the judgment, the learned Judge, referring to a judgment of this Court in *M/s.Transasia Bio-Medicals Ltd. v. M/s.Revijay Clinical Laboratory and Hospital, 2002 (5) B.C. R. 1*, observed :-

> "The opinion expressed in this judgment is that there can be no question of granting a post-facto leave. There can be no dispute that the said proposition is a view which has prevailed since long". (emphasis supplied)

This observation namely that there can be no question of granting post-facto leave is relevant in the present case.

22. The judgment in *Air India Ltd. v. Caribjet Inc.* was affirmed by a Division Bench (to which I was a party) in *Caribjet Inc. v. Air India Ltd. 2005 (3) B.C. R., 94*. Nowhere in this judgment has it been held that leave under clause 12 of the Letters Patent can be granted even after a plaint has been admitted pursuant to its having earlier

been presented. In fact in paragraph 10, the question was framed thus : “The question, therefore, is whether even lodging / filing / presentation of the plaint before the authorized officer of this Court is impermissible”. Following the judgments in *Ramgopal Chunilal's* case, *Union of India v. Sunpac Corporation and others* the judgment of the learned single Judge was affirmed. In paragraph 11 it was held :-

> “So long, therefore, as the plaint is not admitted and entered in the register of suits, all defects including that of the absence of leave under the said clause, can be removed without returning the plaint.”

The above observations do not by any stretch of imagination indicate that the defect can be cured even after the plaint has been admitted. If anything, the observations are to the contrary.

23. Mr.Andhyarujina submitted that if, as held by some of the above judgments, a plaint cannot be admitted without leave under clause 12 of the Letters Patent, an order admitting the plaint would be a nullity. In that event, according to him, the plaint would still remain at the stage of having been presented but not admitted. In such circumstances, he submitted leave can be granted on the basis that the plaint has been presented but not admitted.

24. The submission is interesting and was, if I may say with respect, ably developed. I am afraid however that in view of the judgments of this Court holding that the leave cannot be granted afterwards, it is not open to me to consider this submission. I am bound by the judgments of this Court that no post-facto leave can be granted. The judgment of the learned single Judge in *Rampurtab's* case expressly held that leave cannot be granted afterwards. This judgment was cited with approval by the Division Bench in *Devidatt's* case where it was also held that leave under clause 12 of the Letters Patent is a condition precedent. Khanwilkar, J. in Air India Ltd. v. Caribjet Inc. also held that the proposition that there can be no question of granting post-facto leave has prevailed since long.

In *Noorjahan's* case, also it was held that leave cannot be granted after the suit had been instituted. This observation has not been over-ruled by the Division Bench in Caribjet Inc. v. Air India Ltd. In fact the judgment of the learned single Judge which was affirmed by the Division Bench in *Caribjet Inc. v. Air India Ltd,* also held that no post-facto leave can be granted.

25. The judgments in *Rhoda Mehta's* case and *Noorjahan's* case

holding that the leave is required prior even to presentation of the plaint, obviously therefore, implied that the leave was also required prior to the plaint being admitted. The judgments have been held to be per incuriam by the Division Bench in *Caribjet Inc. v. Air India Ltd.* That however, is only in so far as the judgments held that the leave was required even prior to presentation of the plaint to the authorized officer. The Division Bench did not deal with a case where the plaint had already been admitted and entered in the register of this Court.

26. The effect of the above judgments therefore is that leave may be obtained after the plaint is presented to the proper officer but not after the plaint is admitted and entered in the register. The application for leave is therefore rejected on this ground alone.

WHETHER ANY PART OF THE CAUSE OF ACTION HAS ARISEN WITHIN THE JURISDICTION OF THIS COURT -

27. Mr.Doctor further submitted that even assuming that the leave under clause 12 of the Letters Patent may be sought at this stage it ought not to be granted as no part of cause of action has arisen within the jurisdiction of this Court. He further submitted that a material part of cause of action has not arisen within the jurisdiction of

this Court.

28. The suit is filed for the following reliefs :-

> "(a). That it be declared that by not supplying total quantity of the order the Defendant has failed and neglected to execute the Purchase Order No. QPL/086/2004 dated 18th March, 2004 (Exhibit "A" hereto) and the Defendant has thus committed breach of the contract.
>
> (b). That it be declared that the Plaintiff is entitled to recover from the Defendant or deduct from the Defendant's dues the amounts mentioned in Exhibit "FF-2" hereto as the amounts due and payable by the Defendant to the Plaintiff because of the breach of contract committed by the Defendant by not supplying the balance material to the Plaintiff as per the Purchase Order No. QPL/086/2004 dated 18th March, 2004.
>
> (c). That it be declared that the Bill of Exchange No. QPL-02 dated 17.4.2004 for Rs.14,51,694/- at Exhibit "Z" hereto, is not a genuine and bonafide warranting the Plaintiff to honour the same or make payment against the said Bill of Exchange.
>
> (d). That the Plaintiff is entitled to a permanent injunction and order restraining the Defendant, its agents and servants from acting in any manner whatsoever upon dishonoured Bill of Exchange No. QPL-02 dated 17.4.2004.
>
> (e). That the Plaintiff is entitled to a permanent injunction and order restraining the

> Defendants, their agents, servants and/or representatives from in any manner restricting the use by the Plaintiff or its client of the steel supplied by the Defendant at the words of Arunachal Pradesh PWD.
>
> (f). In the alternative to prayer (e) above, the Plaintiff is entitled to claim damages from the Defendants in the sum of Rs.16,36,873/- as per the particulars of Claim Exhibit "FF-3" annexed hereto."

29. Paragraph 48 of the plaint which deals with jurisdiction, reads as under :-

> "48. The Plaintiffs state and submit that they have their registered office in Mumbai and carry on business in Mumbai. The cause of action arose in Mumbai inasmuch as the negotiations between the Plaintiff and the Defendant were held in Mumbai. The Letter of Credit was opened by the Plaintiff through their Bankers, Canara Bank Colaba Branch, in Mumbai. The Bill of Exchange was sent by the Defendant to the Plaintiff's Bankers in Mumbai. This Hon'ble Court has accordingly jurisdiction to entertain, try and dispose of this suit."

There can be no doubt that the first three sentences in paragraph 48 of the plaint, do not indicate any part of the cause of action as having arisen within the jurisdiction of this Court. That however would not be conclusive of the matter against the Plaintiff if it can be shown from any other part of the plaint that a material part

of the cause of action has arisen within the jurisdiction of this Court. A paragraph pertaining to jurisdiction is for convenience of pleading but not the only source in the plaint for the purpose of establishing jurisdiction.

30. Mr.Andhyarujina submitted that the contract had been arrived at in Mumbai. Paragraph 48 of the plaint admittedly does not contain any averment to this effect. That by itself would not disentitle the Plaintiff to leave under clause 12 of the Letters Patent if the necessary averments were to be found elsewhere in the plaint. There is however not a single averment anywhere in the plaint that the contract was arrived at in Mumbai.

31. Mr.Andhyarujina relied upon paragraphs 5 and 8 and on Exhibit “B” to the plaint to contend that the Plaintiff had averred that the contract had been arrived at in Mumbai. Paragraphs 5 and 8 of the plaint read as under :-

> “5. The Plaintiff states that vide their Purchase Order bearing No. QPL/086/2004 dated 18th March, 2004 the Plaintiff had placed an Order on the Defendant for supply of steel materials, viz. 155 Metric Tonnes of High Tensile Steel to be supplied by the Defendant on or before 1st June 2004 at a place Pasighat in Arunachal Pradesh, at a

> total cost of Rs.53,03,289/-. The Plaintiff states that the above material was required for the Plaintiff to commence the fabrication work at Arunachal Pradesh PWD at Pasighat for which all materials were required to be present.
>
> 8. The Plaintiff states that the Defendant, vide their letter No. SBAL/03-04/QPL/0003376 dated 19.3.2004, agreed to the above specific terms and accepted the said Purchase Order. Hereto annexed and marked Exhibit "B" a copy of the said letter of confirmation/acceptance dated 19.3.2004.

32. Mr.Andhyarujina sought to substitute Exhibit "B" to the plaint with a xerox copy of the original contending that the copy annexed was illegible. I will assume this to be so and read the substituted copy. It is, as averred in paragraph 8 of the plaint, the Defendant's acceptance of the purchase order admittedly sent by it from Raipur which is outside the jurisdiction of this Court to the Plaintiff at Mumbai.

33. This would be of no assistance to Mr.Andhyarujina unless he were to establish, for reasons I shall deal with next, that there is an averment in the plaint or in the application for leave that the acceptance was sent by fax. There is not a single averment in the plaint that the document was sent by fax. Merely because the

document contains the Defendant's fax number and the word `fax' is typed on the document would make no difference. Further the mere fact that in the letter of acceptance the Plaintiff's fax number is typed below the Plaintiff's address would not establish that the acceptance had been communicated by fax to the Plaintiff. It is pertinent to note that the letter contains the fax number and the e-mail address of the Plaintiff and the Defendant. The document on its face does not indicate that it was sent by the Defendant by fax. Neither the said document nor any other letter on record states that it was sent by fax. Had there been such documents and had the contents of the documents been incorporated in the plaint it would have been a different matter. The contents would then have formed a part of the plaint by virtue of a pleading to that effect. This however, is not the case here. There is nothing to warrant a presumption that the acceptance was sent by fax or by e-mail.

34. Indeed as pointed out by Mr.Doctor in paragraph 8, the Plaintiff has stated that the Defendant accepted the purchase order by “its letter” indicating thereby that the documents had been sent by post. This submission is well founded. The Plaintiff has itself stated in

the plaint and in the application for leave under clause 12 of the Letters Patent that the acceptance was communicated by a letter.

35. Faced with this, Mr.Andhyarujina submitted that a letter can also sent by fax. I do not deny the same. However, in that event it would have been so stated specifically. The normal and usual suggestion when it is averred in pleadings that a document is sent by "letter" is that the same was communicated by a non-electronic mode such as by post or hand delivery.

36. The acceptance having been communicated by a non-electronic mode, the contract is deemed to have been entered into/formed in the place from which it was communicated which in this case is Raipur.

37. Mr.Doctor however further submitted that even where the acceptance is communicated by fax, the contract is formed where the acceptance is intimated. I am unable to agree.

38. In *Bhagwandas v. Girdharlal & Co., AIR 1966 Supreme Court, 543,* the Supreme Court held : "The contract becomes complete as soon as the acceptance is made by the acceptor and unless otherwise agreed expressly or by necessary implication by the

adoption of a special method of intimation, when the acceptance of offer is intimated to the offeror." The Supreme Court further held : "Acceptance and intimation of acceptance of offer are, therefore, both necessary to result in a binding contract." The Supreme Court however held that on this rule is engrafted an exception based on grounds of convenience. Where the parties are not in the presence of each other, and the offeror has not prescribed a mode of communication of acceptance, insistence upon communication of acceptance of the offer by the offeree would be found to be inconvenient, when the contract is made by letters sent by post. Thus when by agreement, course of conduct, or usage of trade, acceptance by post or telegram is authorized, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission by the offeree by posting a letter or dispatching a telegram. The Supreme Court however held that in case of contracts made by conversation on telephone, the ordinary view applied. Paragraphs 12 and 14 of the judgment read as under :-

> "12. In England the Court of Appeal has decided in *Entores Ltd.* v. *Miles Far East Corporation-*
> *(1955) 2 QB 327* that: "* * * where a contract is

made by instantaneous communication, e.g. by telephone, the contract is complete only when the acceptance is received by the offeror, since generally an acceptance must be notified to the offeror to make a binding contract;"

In *Entores Ltd. case*4 the plaintiff made an offer from London by Telex to the agents in Holland of the defendant Corporation, whose headquarters were in New York, for the purchase of certain goods, and the offer was accepted by a communication received on the plaintiff's Telex machine in London. On the allegation that breach of contract was committed by the defendant Corporation, the plaintiff sought leave to serve notice of a writ on the defendant Corporation in New York claiming damages for breach of contract. The defendant Corporation contended that the contract was made in Holland. Denning, L.J., who delivered the principal judgment of the Court observed at p. 332:

"When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by Telex. Communications by these means are virtually instantaneous and stand on a different footing.", and after examining the negotiations made in a contract arrived at by telephonic conversation in different stages, Denning, L.J., observed that in the case of a telephonic conversation the contract is only complete when the answer accepting the offer was made and that the same rule applies in the case of a contract by communication by Telex. He recorded his conclusion as follows:

> "* * * that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received."
>
> **14.** Obviously the draftsman of the Indian Contract Act did not envisage use of the telephone as a means of personal conversation between parties separated in space, and could not have intended to make any rule in that behalf. The question then is whether the ordinary rule which regards a contract as completed only when acceptance is intimated should apply, or whether the exception engrafted upon the rule in respect of offers and acceptances by post and by telegrams is to be accepted. If regard be had to the essential nature of conversation by telephone, it would be reasonable to hold that the parties being in a sense in the presence of each other, and negotiations are concluded by instantaneous communication of speech, communication of acceptance is a necessary part of the formation of contract, and the exception to the rule imposed on grounds of commercial expediency is inapplicable." (emphasis supplied)

39. Communication by fax is similar to communication by telex. Communication by fax is also instantaneous and is in fact through, by means of a telephone connection. The Supreme Court has accepted that in the case of communication by telex the normal rule would apply and the contract would be completed only when the acceptance

is received by the offerer. Accordingly, in case of communication by fax, also the normal rule would apply and the contract would be completed only when the acceptance is received by the offerer.

40. Mr.Doctor submitted that though the Supreme Court quoted extensively from the judgment in *Entores Ltd.*' *s* case it had not accepted the ratio therein. I am unable to agree. A plain reading of the judgment makes it clear that the Supreme Court had accepted the ratio of the judgment in its entirety.

41. Thus if in the present case it is found that the letter of acceptance was communicated by fax it would have led to the conclusion that the contract was completed and formed in Mumbai where the communication of the acceptance was received. However, in view of what I have held above, namely that the Plaintiff has not alleged that the communication of the acceptance was by fax, it cannot be stated that the Plaintiff has averred even impliedly that the contract was concluded/formed in Mumbai.

42. Three bills of exchange are referred to in the plaint of which two are not the subject matter of the reliefs claimed. Nor are they the subject matter of the suit. Thus no part of cause of action is based

on two bills of exchange.

43. Mr.Andhyarujina however submitted that a material part of the cause of action is based on the third bill of exchange in respect whereof relief is claimed in prayer (c).

Paragraphs 33, 37 and 38 of the plaint are relevant in this regard. The Plaintiff has denied that it accepted the bill of exchange in respect whereof a declaration is sought in prayer (c) of the plaint. The Plaintiff alleges that its signature thereon is forged. The Plaintiff has set out the manner in which the forgery has taken place. There is no averment as to where the alleged forgery took place.

44. Mr.Andhyarujina relied upon a judgment of this Court in *Canara Industrial and Banking Syndicate Co. Ltd.. v. Narayan Venkatesh Shenoy and another, AIR 1942 Bombay 15* where it was held that any stage which the Plaintiff has to prove in order to establish his title to sue on a negotiable instrument is a material fact and if such event has taken place within the jurisdiction of the Court, with leave granted under clause 12 of the Letters Patent, the Court would have jurisdiction to try the suit.

45. The case before me however, is not a suit on a negotiable

instrument. It is, in relation to a negotiable instrument. The action for a declaration that a bill of exchange is not genuine on a plea based on forgery is not an action based on the negotiable instrument even though it may be in respect of a negotiable instrument. In fact the plea is destructive of one based on the negotiable instrument.

46. In the case of a suit filed for a declaration that a bill of exchange is forged and for the consequential relief of an order seeking the delivery up and cancellation of the bill of exchange, the approach would necessarily be different.

47. Such a suit would fall under section 31 of the Specific Relief Act which reads as under :-

> "**31. When cancellation may be ordered.-** (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
>
> (2) If the instrument has been registered under the Indian Registration Act,1908, the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained

in his books the fact of its cancellation."

48. The cause of action consists of every fact which it would be necessary for a Plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. The cause of action in a suit under section 31 of the Specific Relief Act including in respect of a bill of exchange is not limited to the alleged act of forgery. The cause of action to wit, the bundle of facts necessary for the Plaintiff to prove in such a case consists of more than the alleged act of forgery. It would for instance be necessary for the Plaintiff in such a case to establish that the written instrument, in this case the bill of exchange, if left outstanding, may cause it serious injury. As held by a Division Bench of this Court in *Shiv Bhagwan Moti Ram Saraoji v. Onkarmal Ishar Dass & Ors., AIR 1952 Bombay, 365 :-*

> "The very basis of a suit under s. 39 (new section 31) of the Specific Relief Act is the apprehension of injury to the plaintiff."

In doing so, it may also be necessary for the Plaintiff to establish how and where the injury will or is likely to arise or take place. The written instrument may have even been used at a particular place. It would in such a case also be necessary to allege

that the document has in fact been used or sought to be used against the Plaintiff at that place. The Courts within whose territory the injury is likely to occur by the document being sought to be used or acted upon also have jurisdiction to try a suit based on section 31 of the Specific Relief Act, provided of course the other ingredients of the section are satisfied.

49. In *Nittala Achayya & Ors. v. Nittala Yellamma & Ors., AIR 1923 Madras, 109* (DB), Venkatasubba Rao, J. in his concurring judgment held :-

> "5. The reasoning that will apply to the case of a Will of this character will be the same as that applicable to a document alleged to have been brought about by the exercise of undue influence or fraud. At the place where the document or the Will is executed, a part of the cause of action certainly arises. It is equally clear that where the whole or a part of the fraud or undue influence is practised or exercised, the cause of action also arises. If the document is sought to be used to the detriment of a person at a particular place, the cause of action doubtless arises also at that place. *Banke Behari Lal v Pokhe Ram, (1903) 25 All, 48*. I fail to see, then, why if the document affects the right of a person to a property situated at any place, the cause of action does not arise in that place. The mere existence of the instrument apart from any

> specific act of the person who relies on the document prejudicially affects the right of the plaintiff to the property. If the instrument is left outstanding it constitutes a menace to his right in regard to the property which is within any particular area; it is not merely when the defendant seeks to enforce his rights under the instrument that harm results to the plaintiff. As I observed above, it cannot be denied that the cause of action arises at a place where the document is sought to be enforced independent of the circumstance of its having been executed or the fraud having been practised at an altogether different place....." (emphasis supplied)

50. The judgment was cited with approval by Bhagwati, J. in his concurring judgment in *Shiv Bhagwan Moti Ram Saraoji v. Onkarmal Ishar Dass & Ors*. Indeed, His Lordship in paragraphs 25, 26 and 27 cited with approval the above passage itself. It was noted that *N. Achayya's* case followed the decision of a Division Bench of the Calcutta High Court in *Hadjee Ismail v. Hadee Mahomed, (1874) 13 Bengal L.R., 91*. The Division Bench of this Court also followed this decision. It is also pertinent to note that the judgment of the Division Bench of the Allahabad High court in *Banke Behari Lal v. Pokhe Ram (1903) 25 All 48,* cited with approval in the passage in *N.Achayya' s* case extracted above, has also been followed by several High Courts

in this regard. (see – *Shri Pradeep Gupta v. Haryana Financial Corporation, 93(2001) DLT, 834, Manda R. Pande v. Smt. Jankibai S. Dubey, AIR 2005, Bombay, 397, Asgar Ally & Co & Ors. v. Vuppala Satyanarayana & Ors., AIR 1957 Calcutta, 317, Madan Theatres Ltd. v. Ramkissen Kapoor & Anr. v. AIR 1943 Calcutta, 172*).

51. I am, in any event, in respectful agreement with the judgment in *Nittala Achayya's* case. Further, I would apply the ratio thereof even to documents such as bills of exchange, where there is a reasonable apprehension that if the same are left outstanding, can cause serious injury to the party against whom they are likely to be used. The likelihood or apprehension of injury is an important item in the bundle of facts which constitutes the cause of action in a suit under section 31 of the Specific Relief Act. The Courts in the place where the document sought to be cancelled is likely to cause injury to the Plaintiff and there is a reasonable apprehension that the document if left outstanding may cause the Plaintiff serious injury or the Courts in the place where the document is sought to be used against the Plaintiff will have jurisdiction to try a suit for the cancellation of the document.

52. In *Banke Behari Lal*'s case, the Division Bench held that the cause of action arose in Cawnpore District, where it was sought to enforce a decree inasmuch as some of the properties were situated within the jurisdiction of that Court. There can be no quarrel with this proposition. However, it was also held that if execution of a decree was never applied for the mere passing of it would not have materially injured the Plaintiff.

With the latter observations, I respectfully cannot agree if it was meant to be an absolute proposition. Actual injury or an attempt to injure is not necessary to maintain an action under section 31 of the Specific Relief Act. A reasonable apprehension of a serious injury is sufficient. The question whether or not there is a reasonable apprehension of serious injury must depend upon the facts of each case. In fact, these observations are also contrary to the observations extracted above from the judgment in *N.Achayya*'s case which were cited with approval by the Division Bench judgment of this Court in *Shiv Bhagwan*'s case.

53. In the present case, the bill of exchange was allegedly drawn on the Plaintiff at its Mumbai address. The Defendant alleged

that the bill of exchange was accepted in Mumbai. As evidenced by the correspondence (Exhibit `CC', `DD' and `EE' to the plaint) the Defendants sought to enforce their alleged rights under the bill of exchange through the Plaintiff's bankers in Mumbai. The bill of exchange was sought to be negotiated by the Defendant through its bank, Bank of Baroda, at the Mumbai office of the Plaintiff's bank - Canara Bank. Thus, independent of where the alleged forgery took place the cause of action has also arisen in Mumbai where the bill of exchange was sought to be used. In the circumstances, a material part of the cause of action has arisen within the jurisdiction of this Court.

54. However, in view of my finding on the first question, the application for leave cannot be granted.

55. In the circumstances, the application for leave under clause 12 of the Letters Patent is rejected. The operation of this order is stayed up to 11.2.2008.